

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY GENE GULYBAN,

Defendant-Appellant.

UNPUBLISHED

September 23, 2004

No. 249191

Wayne Circuit Court

LC Nos. 03-000361-01,

03-000828-01

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Defendant appeals of right his conviction following a jury trial for one count of assault with intent to do great bodily harm, MCL 750.84, and one count of assault with intent to commit murder, MCL 750.83. We affirm. This case arose when defendant beat his girlfriend until he had gashed her lip, severely bruised her thigh, cut her head, broken her nose, and punctured her eardrum. When she regained consciousness a few hours later, she asked defendant to take her to the hospital, but he downplayed her injuries and told her to go back to sleep. She called an ex-boyfriend, who arrived to take her to the hospital. When she returned to her room to get some shoes and socks, defendant asked her if they could talk it out. When she insisted on leaving, he refused to let her take a jacket, socks, or shoes, even though it was a cold December morning.

After she got into her ex-boyfriend's car, defendant came out of the house and stood in front of the vehicle, motioning the ex-boyfriend out of the car. The ex-boyfriend got out, but an objective witness testified that she never saw the ex-boyfriend throw a punch; she only saw him try to defend himself. After defendant knocked the ex-boyfriend down in the street, defendant pounced on him and twice slammed his head into the pavement. After the ex-boyfriend's head trauma caused him to visibly lose consciousness, defendant repeatedly slammed his fist into the side of the ex-boyfriend's head, sandwiching it between his knuckles and the pavement. Defendant then stood up, fixed his hat, and ran away. The severe beating fractured the ex-boyfriend's skull and caused him to suffer a seizure. The beating caused nerve damage, speech problems, and hearing loss, including total deafness in one ear. He regained and then lost consciousness, slipping into a coma for twenty-three days.

In a joint trial, defendant was prosecuted for assault with intent to murder for each beating, but the jury convicted defendant on the lesser included offense of assault with intent to do great bodily harm in the case of his girlfriend's beating.

Defendant argues that the trial court erred when it allowed the prosecutor to try both counts in one trial. We disagree. We review for abuse of discretion a trial court's decision to hold one trial for a single defendant's related but separate crimes. MCR 6.120(C). However, we review de novo a trial court's decision that a defendant is not entitled to mandatory severance because the crimes were related. *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003). A trial court must hold separate trials for unrelated offenses. MCR 6.120(B). For purposes of mandatory severance, crimes are related if they arise from the same conduct or "a series of connected acts." MCR 6.120(B)(2). In this case, defendant's act of beating the ex-boyfriend was connected to his act of beating his girlfriend because the original domestic assault caused his girlfriend to seek the ex-boyfriend's assistance, which led to the ex-boyfriend's arrival and the second altercation. The two incidents occurred only a few hours apart, and the second incident stemmed in part from defendant's efforts to conceal the first incident. Under these circumstances, the trial court correctly decided that the two incidents were related and subject to a single trial.

Regarding the trial court's discretionary joinder of the charges, defendant would not suffer prejudice simply from the number of counts, and judicial economy, including the convenience of overlapping witnesses, supported the court's decision for a single trial. MCR 6.120(C). While defendant argues on appeal that in separate trials he could have used MRE 404(b) to keep from each trial's jury any evidence of the beating at issue in the other trial, this argument for prejudice is speculative and undeveloped.¹ *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Because defendant's trial counsel did not develop the argument either, the trial court did not abuse its discretion when it granted the prosecutor's motion for joinder.

Next, defendant argues that the trial court erred when it allegedly allowed the prosecutor to make arguments during his opening statement. We disagree. While the prosecutor included more detail than defendant probably desired, the prosecutor's opening statement did not contain argument, but rather a preview of the anticipated evidence. Moreover, defendant failed to preserve this issue below, and a timely objection could have cured any prejudice caused by the challenged statements. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Therefore, we will not reverse defendant's conviction on this basis.

Next, defendant argues that the trial court erred when it reassigned the trial to a different judge because the original judge was bogged down in a different trial. We disagree. Defendant failed to preserve this issue in the trial court, so we will not reverse his conviction unless we find plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant fails to indicate, beyond bald speculation, that the chief judge who signed the transfer order according to MCR 8.111(C) employed a biased, prejudicial, or otherwise improper method when he determined who should sit in place of the original judge. Therefore, defendant fails to demonstrate any plain error affecting his rights.

¹ The lack of development likely stems from a lack of merit given the background circumstances connecting the two cases and their obvious relevance to one another. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996).

Finally, defendant argues that his trial counsel was ineffective for failing to request a jury instruction on “mutual affray.” We disagree. Because defendant failed to move for a *Ginther*² hearing or a new trial, we limit our review to the record. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Before we will reverse based on defendant’s ineffective assistance claim, defendant must carry his heavy burden of demonstrating that his counsel’s actions were the product of an unreasonable deficiency of legal skill rather than trial strategy. *Stanaway, supra*. Here, defendant’s counsel approved an instruction that specifically explained that defendant disclaimed any intent to harm the ex-boyfriend. The instruction informed the jury that it should find defendant not guilty of assault with intent to commit murder if it found that defendant lacked the specific intent to injure. This instruction accomplished the same purpose as a formulated mutual affray instruction would without undermining defendant’s testimonial account in which he claimed that the ex-boyfriend was the primary aggressor and he was merely trying to defend himself. If counsel had proffered the non-standard instruction proposed on appeal, the prosecutor would have had a perfect avenue for emphasizing evidence of defendant’s actions after the “affray” had stopped – namely, defendant’s admission that he punched the ex-boyfriend while straddling him and after his arms had gone limp. Counsel strategically raised defendant’s lack of intent without injecting a mutual affray instruction that would have raised other counterproductive issues, so defendant received effective assistance.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O’Connell
/s/ Hilda R. Gage

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).